CALCUTTA HIGH COURT

Narhndrala Lal Khan

Vs.

Tarubala Dasi

(Rankin, J.)

14.12.1920

JUDGMENT

Rankin, J.

1. This is an application by an Attorney under Rule 59, Chapter XXXVIII of the High Court Rules, for an order against his client for payment of the sums amounting to ₹ 531-14 0 allowed on taxation of four bills of costs in respect of non-contentions badness. It appears that the Attorney also anted for the client in several other proceedings, being certain execution oases in one of which a considerable sum of money was recovered by the Attorney and war pat into his hand on behalf of his client, Differences of opinion arose between the parties as to whether the particular or active lien of a Solicitor in respect of the sum of money 53 relieved was available for his costs in all or in only one of the execution matters, bat by an order obtained from Mr. Justice Buckland the Attorney has succeeded in having it declared that his particular or active lien extends to all these contentions proceedings,

2. The main difficulty now is due to the fact that before the money in question was received by the Attorney over three years bad elapsed since the completion of the work comprised in each of the four bills of costs. The order of Mr. Justice Back-land, as I construe it, merely directed that these bills of costs should be taxed and that any moneys over and above the amount which in any event would be sufficient to satisfy the Attorney's claim should be re-paid by the Attorney to the client at once. It in no way decided whether these bills of costs were in fact due from the client to the Attorney or not, but it did declare that to the extent to which these bills, when taxed, were due and payable the Attorney should have a right to a set off. In addition to the particular or active lien which an Attorney baa upon monies which have been recovered in a suit, the Attorney has a general or passive or retaining lien upon all moveable’s, deed, documents, and so forth that come into his hands unless they come for a specific purpose which would be inconsistent with the right of retainer; but Mr. Justice Buckland in this case has definitely decided, as appears more clearly from his judgment than from the form of the order, that with regard to the four bills of costs in question, the Attorney has not got the right to- exercise any lien.

3. Now, the law on the subject, so far as it is necessary to state it, stands thus. By Section 28 of the Limitation Act of 1908 it is provided that "on the determination of the period hereby limited to any person for instituting a suit for possession of any property, his right to such property shall be extinguished"; but in the case of a personal action for a debt limitation merely bars the plaintiff from having the particular remedy by way of suit and does not extinguish the debt. Thus, if the Attorney has any form of lien upon property in respect of his bills of costs he can exercise that lien notwithstanding that, by the terms of the Limitation Act, be could not bring a suit. The next proposition of law which is of some importance is this, that so far as the position of a defendant asserting a right of set off is concerned, the limitation bar does apply to him. It applies to him as if he were bringing an independent end of his own, the only difference Wing that, where he is defending himself by way of set off, if his claim was not barred at the time of the issue of the plaint, he may prosecute a set-off even although the time may have elapsed before his filing, say, a written statement claiming the set-off. But with that exception as to the terminus ad quem of the period of time, it is the law in India as well as in England that limitation applies to a set-off. Now, in this case, the question of passive lien or right of retainer having been disposed of by Mr. Justice Buskland's judgment and the right of set-off being subjecte to the principle of limitation, it is or may be a matter of real importance whether, under Rule 59, I can make an order against the client for payment.

4. On the affidavits, which are very short, there if, in essential matters, no substantial dispute, the contention expends itself upon things which matter little now. The retainer, the fact that the work was done, and the proper charges there for are all beyond dispute.

5. As regards one of the bills, an objection is mentioned in the Attorney's own affidavit. It refers to the bill for ₹ 287 in the matter of the Landora estate. It was not apparently taken before Mr. Justice Buckland but is one of the objections mentioned or aired before the Taxing Officer. The objection is, that by the terms of the letter of retainer in this particular matter the Attorney was to look for his costs not to his client the prospective mortgager, but to the prospective borrower or mortgagor. If any real case of this sort was disclosed, I should except this particular bill from my order, but on the terms of the latter it is as plain as possible that there is no foundation for the contention that the Attorney was to act upon the footing that his client should not be liable for costs as distinct from the usual arrangement that the mortgagor shall pay the mortgagor costs incidental to the loan. The letter has been set out in the Attorney's affidavit. The affidavit in answer says merely this---"I am advised that the contention of the Raja that the bill of costs re Landora estate is not payable by him is valid." I have no fasts at all before me upon which I can be satisfied that there is in this matter any bona Me or substantial dispute as to the existence or non-existence of a special bargain between the Attorney and the client. No where do I find it stated that on sash and sash a date a verbal bargain was made to that effect; nowhere do I find in the affidavit of the respondent a case whose seriousness or bona fides can be investigated to the effect that this Attorney was to act for the lender but was to look entirely to the borrower for

these costs. There is no doubt, moreover, that the transaction fell through and neither the letter nor anything else in evidence discloses any case at all for so extraordinary a bargain as that the Attorney should do work for a lender upon the terms that, even if the loin went off, the lender should not be answerable for his own costs. There is, in my opinion, no matter for enquiry; no matter which needs to be elucidated in a suit; the jurisdiction of the Court under the rule is not ousted by a mare statement from the lip(sic) outwards disclosing a willingness on the part of the client to contend something for which he can indicate no concrete case.

6. The bills of costs were taxed and the Attorney retained a certain amount and refunded the surplus stating at the time to the client that when the Court reassembled after the vacation he would make an application for the purpose of determining whether he was entitled to pay himself out of the moneys so retained, The first objection with which the Attorney is met is that he cannot gee an order for payment under Rule 59 because he has already been paid. In my opinion there is no substance in that objection more particularly having regard to the fast that by his letters the Attorney has retained the moneys carefully setting out that he will apply to subordinate his right. How little substance there is in that objection may, I think, be clearly seen by considering it from the point of view of the client. The client claims that the money is his, that there is no debt, and that nothing the Attorney can do will entitle him to appropriate that fund. Claiming that, he cannot be beard to say that an order for payment cannot be made against him because the Attorney has already been paid.

7. I come now to the question whish arises by reason of the lapse of time between the completion of the work and the receipt by the Attorney of the money. It is alleged by the Attorney in his affidavit that from time to time he had made out his bills of costs in respect of the various eases and matters including the four bills now in question and that he had made them over to his client for examination. "I had also from time to time asked Raja Narendra Lal Khan to pay me the said costs including those mentioned in the second paragraph and the said Raja Narendra Lal Khan had on several occasions personally requested me that I should wait until his dues should be realized in the said execution eases and should take my costs out of the monies so realized, and in compliance with such request I did not take any seeps to enforce payment of my said costs." The answer to that and the only answer, in the affidavit of Ramrati Mukherjee, the agent of the client, is,---"I admit that the said Babu Hirendra Nath Dutt made over certain untaxed bills but have no knowledge that the said Raja Narendra Lal Khan personally requested him to wait for payment until his dues in the execution case be realized or that the said Raja suggested that the costs of the said Babu Hirendra nath Dutt should be deducted from the costs when realized." In that state of affairs, there is no denial, no statement even, that the client had informed the deponent that the statement of the Attorney, upon oath was untrue. I feel, therefore, both entitled and obliged to act upon the footing of its truth.

8. The first question whish arises, therefore, is, whether upon uncontradicted matter there is not an answer to any objection based upon limitation. In my opinion the evidence of the Attorney is good and sufficient evidence of a verbal promise on the part of the client, a promise given for

consideration to pay the Attorney when money was recovered in the execution cases. This view agrees with a principle whose illustrations are well known. "A promise to guarantee a debt if the creditor will give time to the principal debtor is in the first instance an offer. It becomes a binding promise when the condition of giving a specified time or a reasonable time has been performed" (Pollock on Contracts, 7th Edition, page 202). I see no answer upon the present evidence to this contention, but Mr. Pugh has contended that, if there is any special bargain of the sort, Rule 59 cannot be applied. In my opinion, unless the special bargain is a matter of dispute, the rule is in no way inapplicable. It says nothing about the Attorney's retainer or about an original or subsequent bargain. The test is, whether there are in the end only questions requiring to be elucidated in a suit, If not, the only other condition is that the application shall be one for payment of the amount of a taxed bill of costs.

9. On this view, it is unnecessary for me to consider the somewhat difficult questions that have been discussed upon the assumption that if the Attorney Were to bring a suit for the recovery of this money, he would be debarred by the Limitation Act, but 1 will deal shortly, as an alternative method of disposing of this application, with the question on that footing.

10. It has been held by authority in this Court, following authority in the Bombay Court, that under the rule in question neither Article 84 nor Article 181 of the Limitation Act applies. Article 84 does not apply, because the proceeding is not a suit. Article 181 does not apply, as Mr. Pugh for the respondent is constrained by the decisions to admit, because this application is not an application contemplated by the Civil Procedure Code. The result is that Rule 69 is technically free from any Statute of Limitation. This matter having been drawn to the attention of Mr. Justice Chaudhuri in this Court, in the case of *Lakhimoni Dassi v. Dwijendra Nath Mukherjee*[1] that learned Judge makes this observation:

> If there is no special rule of limitation, discretion has to be exercised in allowing such applications which are of a summary nature. The rule itself provides for an alternative relief, via, relief by suit, and such a suit can only be instituted within the time allowed under Article 84 of the Limitation Act and it, therefore, seems to me that in exercising discretion with regard to such applications, when a question of lapse of time is raised, it should be considered whether the time allowed by Article 84 ought not to be the time limit.

11. I observe that the learned Judge there used very guarded language and as his observation is only obiter this is not unnatural. I do not feel quite certain whether the inclination of his opinion was that the time limit should be imposed in all cases by an analogy drawn from Article 84 or that in every case, it was a question to be considered as a matter of discretion upon the special facts. In any case, Mr. Pugh for the respondent contends that any discretion, in order to be sound, must be so restricted and controlled by analogy from the Limitation Act; and he adds the further contention that, save on this condition, Rule 59 of Chapter XXXVIII of the Rules of this Court is ultra vires. It appears that the substance of the rule was introduced into this Court in 1905 from

the rules of the Bombay Court which have contained this provision for over 40 years. It must be admitted also that Mr. Pugh has against him on both the contentions just mentioned the case of *Wadia, Gandhy & Co. v. Purshotam Sivji*[2] and a very considerable body of judicial opinion therein cited. As to the rule being ultra vires I think it is either valid or invalid as it stands: it is not conditionally valid or conditionally invalid. I think it impossible to hold that, because the Limitation Act seta a limit only to suits and applications contemplated by the Civil Procedure Code and has provided none for other application, therefore the High Court's power under its Charter to make rules to regulate proceedings can never be exercised by providing special forms of opportunities of making applications to the Court, There is nothing in the case of *Chunilal Jethabhai v. Dhayabhai Amulakh*[3] which warrants and countenances this contention. It was concerned with an appeal as to whish specific provision had been made by the Limitation Act.

[1]51 Ind. Cas. 941 : 46 U. 240 : 28 C.W.N. 470 [3]33 B. 14 : 9 Bom. L. R. 1186

[2]32 B. 1 : 9 Bom. L. R. 503

12. The contention that under Rule 59 any discretion, in order to be right, must be exercised only within the limits set by analogy from Article 84 is, I think, much more serious. One naturally assumes that the intention of the rule was not to enlarge the rights of any parties but to enable a more summary remedy to be given in cases which did not require the more elaborate procedure of a suit. It has, however, to be observed that when this rule was borrowed from Bombay, decisions in Bombay had for a considerable time been to the effect that the Limitation Act did not narrow what the Court under this rule ought to do. The case already cited, and the cases therein relied on, show that the Bombay High Court under this rule, have made orders either without enquiring into the question of limitation though raised, or in spite of the knowledge that limitation would have barred a suit. Further, and apart from these cases, in the case of *Ramhari Sahu v. Madan Mohan Mister*[4] a Division Bench of this Court dealt with an application which could be regarded either as made under a rule of the Court which was technically free from any statutory limitation or as made under Section 558 of the old Code which attracted Article 168 of the Limitation Act. The application was allowed though the matter was purely discretionary in its nature and although under the Code it would have been barred. I do not think it open to me on the authorities to lay down an abstract or a priori rule to the effect that it is necessarily wrong to exercise this discretion in a case where a suit could not succeed; any such rule must be laid down, if at all, by a higher tribunal. I think my discretion is to be exercised in the present state of the authorities upon the wall known lines and in the well established manner on the particular facts of each case. "The Limitation Act ", as was said in a case already cited [*Chunilal Jethabhai v. Dahyabhai Amulakh*[5] "being an Act of a restrictive character must be strictly construed."

13. In the present case, it appears from what I have said already that there is a special state of fasts strikingly in favor of the applicant. On an application such as this, I think it makes all the difference when a question of lapse of time is raised whether the Court is dealing with a position in which the facts are not really in controversy or with a matter as to which real and substantial dispute upon the facts is shown. If, upon examination, it appears that a real dispute exists as to fasts, then not only would a suit be a safer form of remedy for other reasons but the principle of limitation is itself a highly desirable safeguard. Here, however, that is not so, and a very strong appeal to have the Court's discretion exercised in his favor is made by an Attorney who can show

without serious challenge such a course of conduct on his client's part as I have here to deal with. The Statutes of Limitation, still less the principle of limitation, are not intended as an aid to unconscionable conduct though necessarily in securing other ends they afford scope for this. In this case, I can see no other end to be secured, because I think the more summary remedy can be given safely upon unchallenged facts. The debt subsists; its justice is unimpeachable; the appeal to the analogy of Article 84 is on the unchallenged evidence of the Attorney made in circumstances which render it not merely shabby but discreditable. In that state of affairs, if it be a matter of discretion, I answer that if I have the power I have the will. I must be shown that statutory provision or recognized judicial principle forbids. I cannot vouch judicial discretion for extending by analogy a restrictive Statute in sacrifice of the merits of the case.

14. The application succeeds with costs.

[4]23 C. 389: 12 Ind. Dec. (N. s.) 227

[5]33 B. 14: 9 Bom. L. R. 1186